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Federal Communications Commission
Office of the Secretary

June 24, 1992

VIA FEDERAL EXPRESS

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

92-90 /

Dear Ms. Searcy:

Enclosed for filing, please find an original and 10 copies of MessagePhone's Reply Comments in the Matter of The Telephone Consumer Protection Act of 1991. A copy for each Commissioner is included.

Please acknowledge receipt of this filing by date stamping the extra copy and returning it to MessagePhone in the self-addressed envelope provided.

Sincerely,

Douglas E. Neel
Vice President,
Regulatory Affairs

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

The Telephone Consumer Protection
Act of 1991

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CC Docket No. 9290

RECEIVED

JUN 25 1992

TO: The Commission

Federal Communications Commission
Office of the Secretary

REPLY COMMENTS

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Dated: June 24, 1992

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JUN 25 1992

Federal Communications Commission
Office of the Secretary

TO: The Commission

1 Under the TCPA, Section 227 was added to the Communications Act of 1934, as amended (the "Act"). This new law contains specific prohibitions against unsolicited telephone calls. Pursuant to Section 227(b), the Commission is authorized to exempt certain classes of telephone calls from the restrictions prescribed in the TCPA.

telephone lines, cellular telephone companies, and long distance telephone services.

I. SUMMARY

As MessagePhone demonstrates in its Comments in this proceeding, Congress recognizes the public interest benefits of MDS and thus intends its unrestricted provision under the TCPA. As Congressman Markey, Chairman of the House Subcommittee on Telecommunications and Finance, stated:

For example, if a consumer is late catching a plane and calls his home to tell his wife he'll be arriving late and can't get through to her, this service allows him to leave a message and board the plane. While he is traveling the service automatically dials the number repeatedly until the message is delivered. Such a voice messaging service is a benefit to the consumers and should not be hindered by this legislation.²

Inexplicably, the Commission, in the NPRM, ignores such clear Congressional intent.

First, the Commission misinterprets the TCPA by subjecting only those calls made with automatic telephone dialing systems ("autodialers") to its proposed restrictions instead of subjecting all prerecorded messages, regardless of whether an autodialer is used. This misinterpretation results in the Commission failing to address MDS, especially those services that do not utilize autodialers.

It is without question that, under the TCPA, the Commission must address MDS and must exempt them from its restrictions. As

² Cong. Rec. H 11310 (daily ed. Nov. 26, 1991)("Cong. Rec.").

Congressman Rinaldo, the ranking minority member of the House Subcommittee on Telecommunications and Finance, clearly stated:

Among categories which should be made available to the public are voice messaging services which deliver legitimate personal messages to one or more persons.

Clearly, these types of personal voice messaging services are not evasive of a person's privacy rights, and [the TCPA] is not intended to prohibit these or other such services yet to be developed.³

In its Comments, MessagePhone recommends rule changes that must be adopted to correct this unacceptable and unauthorized situation. Specifically, MessagePhone recommends that the Commission adopt a definition of autodialers that would differentiate autodialer technology from prerecorded, message delivery technology. Having adopted this definition to clarify that MDS are covered by Section 227, the Commission then must expressly exempt from such Section 227 restrictions all prerecorded messages, delivered to residences, that do not utilize autodialers.⁴ The other proposed rules in Section 64.1100(c) should be adopted as written. Absent adoption of MessagePhone's proposed revisions, the legality of providing MDS and other messaging services would be in regulatory limbo and continued growth and public service benefits of these services would be jeopardized.

Second, the Commission compounds this problem of limiting the scope of its proposed rules to autodialers by failing to

³ Cong. Rec. at H 11311.

⁴ See Exhibit A attached hereto.

define the term itself. Until this ambiguity is resolved and the rules revised accordingly, the types of services that are subject to the Commission's Rules will be uncertain. In its Comments, MessagePhone proposes a solution to this problem. Specifically, the Commission should adopt the definition, used in the TCPA, that differentiates between autodialers and message delivery technology:

(1) The term "automatic telephone dialing system" means equipment which has the capacity --

(A) to store or produce telephone numbers to be called using a random or sequential number generator; and

(B) to dial such numbers.⁵

MessagePhone's concerns and recommended solutions to solve these problems are repeated throughout the record of this proceeding. Recognition is uniform that the public interest benefits of MDS justify its exemption from the restrictions to be promulgated by the Commission under the authority of the TCPA. A strong consensus emerges supporting MessagePhone's position, compelling the Commission to expressly address and exempt MDS from Section 227 by adopting MessagePhone's proposed revisions to the rules set forth in the NPRM.⁶ Thus, based upon Congressional intent and upon the record of this proceeding, the Commission has no choice but to revise its rules and incorporate the proposals made by MessagePhone.

⁵ 47 U.S.C. Section 227(a)(1) (1992).

⁶ MessagePhone Comments at 7-10, 31, 40, 42-43. See also Exhibit A attached hereto.

II. THE COMMISSION MUST SPECIFICALLY ADDRESS AND EXEMPT MDS

In the NPRM, the Commission misses the mark on two fundamental issues. First, it completely fails to address prerecorded messages that are delivered without the use of autodialers. This omission, as MessagePhone demonstrates, undermines clear Congressional intent that all prerecorded messages delivered to residential telephones, including those delivered without use of an autodialer, are subject to the TCPA and, consequently, subject to the Commission's Rules promulgated thereunder.

Second, once this statutory requirement is satisfied and non-autodialer message services are made subject to the Commission's Rules, the Commission then is obligated to consider whether MDS should be exempted from its restrictions. Having neglected to recognize that MDS and related messaging services are subject to the TCPA, the Commission never took this required second step.

A. Congress Intends That The Commission Specifically Address And Exempt MDS.

Congress passed the TCPA to protect consumers against invasion of privacy; protect the integrity of emergency telecommunications networks; and eliminate undue interference

with interstate commerce.⁷ To implement these protective measures, Congress intends controlling the use of two separate pieces of technology for the purpose of making prerecorded unsolicited, telemarketing calls. These technologies are: (1) autodialers (covered in the NPRM) and (2) prerecorded, non-autodialer voice messages, such as MDS (not covered in the NPRM).

Unfortunately, the Commission, in the NPRM, focuses only on autodialer-initiated calls and inexplicably avoids consideration of MDS. The impact of this omission could be catastrophic for MDS and other voice messaging services. Congress intended that these services be subject to and then exempted from Section 227. If the Commission fails to track this treatment in its proposed rules, it is conceivable that MDS inadvertently would be prohibited entirely under Section 227. This myopic approach by the Commission violates its statutory responsibility under the TCPA and threatens the survival of publicly beneficial services.

One egregious example of this oversight involves the Commission's treatment of the restriction in Section 227 against "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message."⁸ This particular restriction is concerned only with prerecorded messages and not with autodialers. MDS would be prohibited under a literal reading of this statutory restriction. By limiting its proposed rules to autodialer calls, the Commission

⁷ TCPA at Sections 2(5)-(7), (14); MessagePhone at 12-14.

⁸ 47 U.S.C. Section 227(b)(1)(B) (1992).

consequently fails to address whether MDS should be exempted from this restriction on unsolicited residential calls and thereby creates a situation Congress clearly does not intend.

Other parties also note this problem with the Commission's proposed rules:

Neither the Act, nor the proposed rules, refer to autodialers in the restriction on calls to residential lines. Both refer only to artificial or prerecorded voice messages. Moreover, the definition of an autodialer in the Act does not include as a component of such a system, an artificial voice or prerecorded message. The Commission should clarify this ambiguity.⁹

Congress realized that the wording of this particular restriction is overly broad and could, unintentionally, prohibit services that are deemed valuable by consumers. For this reason, Congress intends that the Commission address MDS and then exempt such services from Section 227 of the Act. Such necessary action, however, is not taken by the Commission in the NPRM because it makes a threshold mistake of limiting the scope of the rule to autodialers.

MessagePhone cites extensively from the floor debate to show Congress' unequivocal intention that the Commission address and exempt MDS from Section 227 of the Act.¹⁰ The record of the NPRM supports MessagePhone. There is universal agreement by parties filing comments on this issue supporting exemption of MDS:

Voice message delivery services, which arguably are prohibited by a literal reading of both the proposed

⁹ GTE at note 8; See also Unisys at 3-4; Pacific Telesis at 4-5; Ameritech at 1, 7-8.

¹⁰ MessagePhone at 16-19.

rules and the Act, do not infringe upon the consumer's right to be undisturbed by commercial messages, and, consequently, should be specifically exempted from the prohibitions of the Act.¹¹

In fact, based upon the strength of the statements made during the floor debate, there is a Congressional mandate that the Commission specifically address and exempt MDS. Ameritech agrees:

Such an exemption [of MDS] would be consistent with, and probably is mandated by, the legislative history of the Act.¹²

B. Exempting MDS Is In The Public Interest.

Once the Commission remedies its oversight regarding the applicability of Section 227 to MDS, the next step is easy.

¹¹ Ameritech at 7. See also Bell Atlantic at 2; Unisys at 3-4; Pacific Telesis at 4-5; Ameritech at 1,8; AT&T at 3, note **. The Comments of Bell Atlantic are helpful because they further illustrate the ambiguity of the Commission's proposed rules. Bell Atlantic states that the legislative history of the TCPA affirms Congress' intent not to "impede communications services which store and transmit individual messages." Bell Atlantic at 2. However, because the Commission limits its proposed rules only to prerecorded messages delivered with autodialers, Bell Atlantic interprets the NPRM differently and concludes that all MDS are exempt instead of being prohibited outright. Given Congress' clear intent, this confusion must be eliminated. See also BellSouth at 2-3; AT&T at 1, note *.

¹² Ameritech at 8. Ameritech quotes a provision in a recently enacted law demonstrating how the Illinois legislature specifically differentiates voice messaging and MDS:

Nothing in this Act shall prohibit a telephone company from providing a service that is utilized for relaying messages for private purposes, including but not limited to, voice messaging services or message delivery services. The Automatic Telephone Dialer Act, Public Act 87-0275, ILL. ANN. STAT., Ch. 121 1/2 Par. 2620.

Ameritech at note 12.

Pursuant to the requirement set forth in Section 227(b), the Commission must determine whether MDS are exempt from the restrictions against unsolicited telephone calls.

Exempting MDS from Section 227 of the Act is in the public interest. MDS meet the Section 227 criteria for exemption because they do not adversely affect telephone subscribers privacy rights, do not interfere with interstate commerce, and do not transmit unsolicited advertisements.¹³ Moreover, as MessagePhone and Bell Atlantic note, the Commission previously concluded that the provision of MDS is in the public interest.¹⁴

Rather than providing the intrusive, unwanted telephone calls prohibited under the TCPA, MDS facilitate private communications by allowing the calling party, in response to a busy or unanswered telephone call, to deliver a voice message to the destination. The message being delivered is little more than a delay in a standard transmission. Consequently, unlike the calls restricted by Congress, consumers want MDS:

[T]he widespread consumer and industry interest in voice message delivery services justify a specific exemption.¹⁵

Indeed, the record of this proceeding is highlighted by examples of MDS public benefits:

The primary purpose of PTMDS [public telephone message delivery service] is to facilitate personal communications. For example, this service could be invaluable for airline passengers who need to inform

¹³ MessagePhone at 25-29.

¹⁴ MessagePhone at 32-33; Bell Atlantic at 3.

¹⁵ Ameritech at note 17

someone of a change of plans while on a short layover. Other pay telephone users will also find PTMDS to be a valuable service....The Commission should specifically exempt this and similar voice messaging services from the prohibitions in the Act.¹⁶

The most widely utilized application of MDS is from public pay telephones. However, MDS are becoming more readily available to cellular, business and residential subscribers:

These [MDS] include services which allow the subscriber to record a message from a residential, business or coin telephone for later delivery to others; a service that delivers a stored message to the subscriber at a specified telephone number; and services which store facsimile messages for forwarding to intended recipients.¹⁷

For these reasons, the Commission should not limit the exemption only to MDS for public telephones.

III. THE PROPOSED RULES ARE AMBIGUOUS AND MUST BE REVISED TO INCLUDE A DEFINITION OF "AUTOMATIC TELEPHONE DIALING SYSTEM."

In Section II, supra, MessagePhone recounts the problems created by the Commission's decision to base its proposed rules on autodialer use only. Exacerbating these problems is the fact that the Commission uses the term "Automatic Telephone Dialing System" or autodialer in its proposed rules and yet fails to supply a definition for this critical term.¹⁸ This oversight results from the Commission failing to propose rules that differentiate between randomly-delivered, prerecorded sales

¹⁶ Ameritech at 8. See also Bell Atlantic at 2-3; MessagePhone at 16-19, 24-30, 32-34; Pacific Telesis at 4-5.

¹⁷ Bell Atlantic at footnote 5. See also MessagePhone at 24-25.

¹⁸ Sections 64.1100(a)(1), (4).

presentations (that use autodialers) and personal messages (MDS), that are merely a delayed completion of the original, attempted personal communication (that do not use autodialers, but still might be dialed with the assistance of a computer).¹⁹ Furthermore, as documented in Section II, this failure controverts Congressional intent by excluding MDS from coverage under Section 227.

A. Numerous Parties Are Confused By The Commission's Use Of "Autodialer."

MessagePhone is not alone. Its concern over the Commission's failure to define "autodialer" is supported by the record:

It is important to distinguish calls which are initiated using a random or sequential number generator from those calls where a specific number is dialed, either manually or with computer assistance.... Without clarifying that the "automatic telephone dialing system" referred to in sec 64.1100 relates solely to sequential or random number generation, the restrictions could apply to these non-intrusive types of telephone service.²⁰

The Commission apparently uses the term "autodialer call" in ways that could mean any one of the following: (1) an autodialer call with a prerecorded message; (2) an autodialer call with a live solicitation; or (3) any call that transmits a prerecorded message:

Paragraph 2 of the Notice correctly summarizes the provisions of the statute and proposed regulations,

¹⁹ MessagePhone at 20-22, 28-29.

²⁰ Pacific Telesis at 2.

noting that there is a general prohibition on making calls to residences without prior consent "using an artificial or prerecorded voice." Later in the Notice, however, it is stated that "Autodialer calls are prohibited to: residential telephone lines..." (contrasting "autodialer calls" with "live solicitations"). In these statements, the term "autodialer call" is apparently being used as a shorthand for "transmission of a prerecorded message."²¹

Furthermore, the record demonstrates that the Commission fails to differentiate live marketing calls that are "set-up" with autodialers and do not use prerecorded messages to deliver solicitations.²² The rules adopted by the Commission should not assume that all calls, initiated with autodialers, deliver prerecorded messages or that calls delivering prerecorded messages necessarily are initiated with autodialers (e.g., MDS).²³

B. The Commission Should Adopt MessagePhone's Definition For "Automatic Telephone Dialing System."

MessagePhone's amendment to the Commission's proposed rules defining "automatic telephone dialing system" will correct the ambiguities described above. MessagePhone does what the Commission should have done in the first place by proposing the

²¹ NATA at 3 (footnotes omitted).

²² NATA at 4-5; GTE at 3.

²³ See Ameritech at note 8; NATA at 3; GTE at 6-7. These comments clearly illustrate that it is neither the singular use of automatic telephone dialing systems nor the prerecorded messages that the public finds so objectionable. Rather, it is the use of both classes of technology to deliver unsolicited sales presentations that is so unpopular. The definitions and rules adopted by the Commission must reflect this fact.

definition from the TCPA and from Section 227(a)(1) of the Act. Adoption of this definition will result in the distinct technologies for autodialing and for recording and delivering messages being treated appropriately. This definition will enable the Commission to differentiate between calls that involve various classes of technology, appropriately fashion rules that cover autodialer and non-autodialer originated calls, and then exempt those classes of calls that are in the public interest (e.g., autodialed calls with live solicitors, non-autodialed calls with recorded messages, and autodialed calls with recorded messages).

The use of this definition is supported by at least one other party in this proceeding.²⁴ In addition, the same terminology should replace the phrase "automatic dialing devices" in proposed Section 64.1100(d) regarding technical and procedural standards.

C. The Commission's Technical And Procedural Standards Should Only Apply To Autodialed, Prerecorded Solicitations.

MessagePhone recommends that the only technical and procedural standard remotely relevant to MDS is the Commission's proposed requirement that the caller record his or her name at

²⁴ Pacific Telesis at 1-2.

the beginning of the message.²⁵ The proposed standards obviously are intended as a safeguard against random telemarketing solicitations by providing some level of accountability (identification of the soliciting individual or company). Because MDS complete personal telephone calls, however, the degree of identification required by the proposed standards simply are not necessary and will be perceived as a nuisance.

Several parties agree with MessagePhone.²⁶ This support includes recommending that the Commission completely exempt MDS from Section 64.1100 standards.²⁷

Whether the Commission totally exempts MDS from Section 64.1100 standards or requires users of MDS to first record their name, standards for MDS must be differentiated from standards for random, autodialed, prerecorded solicitations.

IV. OTHER MESSAGING SERVICES ALSO SHOULD BE EXEMPTED

Driven by consumer demand for messaging services, numerous new services have proliferated which require the delivery of

²⁵ MessagePhone at 40-41. The scope of the proposed technical and procedural standards is unclear. This uncertainty results from the use of the phrase "automatic dialing devices" in proposed Section 64.1100(d). Is an "automatic dialing device" the same as an "automatic telephone dialing system" as defined in Section 227(a)(1) and as used in the Commission's proposed Section 64.1100(a)(1)?

²⁶ Ameritech at 9-10; Pacific Telesis at 7-8; GTE at 6.

²⁷ Ameritech at 9-10.

short voice messages. In particular, MessagePhone describes "automatic collect call processing," "automatic call back," and "collect MDS."²⁸ The Commission also should consider whether these services are subject to Section 227 restrictions.

Several Regional Bell Operating Companies ("RBOCs") agree:

[t]he Commission should clarify that calls placed utilizing systems such as BellSouth's Automated Alternate Billing System (AABS) are not prohibited by Section 227(b)(1)(A). With such calls, the called party may interact with prerecorded voice prompts to indicate, for example, whether he or she will accept a collect call. During AABS processing, no commercial message is delivered, nor is any call completed or billing initiated without a positive response by the called party.²⁹

Similarly, Bell Atlantic explains that incidental voice messages should not be subject to restriction:

Certain voice messaging features include introductory messages recorded by Bell Atlantic. For example, a subscriber can have Bell Atlantic call him to say that a message is waiting in his voice mailbox. The addition of such an incidental message, even if heard by a non-subscriber who answers the telephone, does not constitute the "initiation" of a call using a recorded or artificial voice under the TCPA or the Commission's proposed Rules.³⁰

All these services are beneficial to the public and their availability should not be restricted. The Commission must review the proposed rules and assure that new services, using short, prerecorded messages, are not inadvertently prohibited. Adoption of MessagePhone's proposed rules will assure that these new services are not thwarted.

²⁸ MessagePhone at 34-36.

²⁹ BellSouth at 4; See also Ameritech at 10-11.

³⁰ Bell Atlantic at note 10.

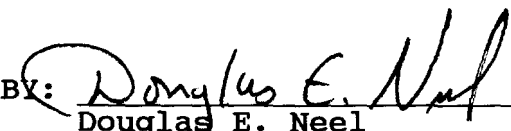
V. CONCLUSION

As demonstrated herein, the record developed by this proceeding supports the adoption of MessagePhone's revisions to the Commission's proposed rules. It is essential that the Commission differentiate MDS from the prerecorded solicitations of telemarketers. In this manner, valuable new services will continue to be available to consumers.

Accordingly, the Commission should address and exempt MDS from Section 227 prohibitions by adopting the revisions to the NPRM as proposed by MessagePhone.

Respectfully Submitted,

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June 24, 1992

Exhibit A

MESSAGEPHONE'S PROPOSED REVISIONS

MessagePhone's revisions to the Commission's proposed rules are underscored.

A new Section 64.1100(e) must be added to include a precise definition for "automatic telephone dialing system" ("autodialer"):

(e) automatic telephone dialing system - equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator to dial such numbers.

Proposed Section 64.1100(c) should be amended so that MDS expressly are exempt from the rules:

(c) the term "telephone call" in Sec. 64.1100(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made with an automatic telephone dialing system:

(2) that is not made for a commercial purpose:

(3) to any person with whom the caller has had a prior or current business relationship at the time the call is made; or

(4) by a tax exempt nonprofit organization.

Proposed Section 64.1100(d) should be amended to clarify and narrow the scopes of the technical and procedural standards:

(d) all artificial or prerecorded telephone messages shall:

(1) at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) all messages being delivered with an automatic telephone dialing system shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual.

Alternatively, proposed Section 64.1100(d) can be amended to address only messages delivered by autodialers:

(d) all artificial or prerecorded telephone messages delivered by automatic telephone dialing systems shall:

(1) at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and


(2) during or after the message, state clearly the telephone number or address of such business, other entity, or individual.

Certificate of Service

I, Janice LeRoy, administrative assistant for MessagePhone, Inc. hereby certify that I have on this twenty-fourth day of June, 1992, sent copies of the foregoing Reply Comments by first-class United States Mail, postage prepaid, to the parties on the attached list and to the following:

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